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No. 85-1198

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE F. GROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied his Sixth Amendment right to a speedy trial under *Barker* v. *Wingo*, 407 U.S. 514 (1972).

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-10a) is reported at 21 M.J. 53. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on November 18, 1985. The petition for a writ of certiorari was filed on January 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Following a special court-martial, petitioner, a member of the United States Marine Corps on active duty, was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He

was sentenced to a bad conduct discharge, confinement at hard labor for 60 days, and reduction to pay grade E-1. The convening and supervisory authorities approved the sentence without change. The Navy-Marine Corps Court of Military Review affirmed (Pet. App. 11a-12a) and, on further review, the United States Court of Military Appeals also affirmed (*id.* at 1a-10a).

1. The evidence at petitioner's court-martial, the sufficiency of which is not in dispute, showed that petitioner possessed a small cache of marijuana and hashish in his off-base apartment in Emerald Isle, North Carolina. The drugs were discovered on January 23, 1981, by civilian and military law enforcement authorities during a search of petitioner's apartment conducted pursuant to a warrant obtained by civilian Deputy Sheriff Galizia. Galizia arrested petitioner the same day and he was arraigned on state drug possession charges. The civilian charges were dismissed on March 25, 1981. Military authorities preferred charges against petitioner on May 8, 1981. Pet. App. 2a-3a; see Tr. 10, 15-16, 42, 82, 86, 207, 209, 211, 214; Tr. App. Exhs. 9, 11.

The same day that petitioner's apartment was searched, three other Marines were apprehended for drug possession at Marine Corps Air Station, Cherry Point, North Carolina. These servicemen confessed and identified petitioner as their supplier. Military authorities therefore determined to secure the convictions of the three Marines and then to use their immunized testimony in order to convict petitioner of more serious charges of selling, transferring, and introducing marijuana on the base. During the formal pretrial investigation of petitioner's case,[1] however, the Marines unexpectedly recanted their sworn confessions and refused

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[1]Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, requires completion of a "thorough and impartial investigation" before a charge or specification may be referred to a general court-martial.

to implicate petitioner in any drug transactions. Accordingly, the charges affected by this testimony were dropped, leaving only the charge arising from the seizure of drugs at petitioner's off-base apartment. Following completion of the pretrial investigation on December 7, 1981, the possession charge was referred to a special court-martial on December 18, 1981. At the request of petitioner and his counsel, the trial date was continued until January 4, 1982. Pet. App. 2a-5a; see Tr. 16, 25-26, 44; Tr. App. Exhs. 1, 3-9.

2. The Court of Military Appeals held that the eight-month period between institution of military charges and the court-martial did not violate petitioner's Sixth Amendment right to a speedy trial. Pet. App. 1a-10a. Applying the balancing test established by this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), the court reasoned that while the delay in this case was sufficient to trigger a full inquiry into the relevant factors under *Barker*, the military's decision to postpone trial in order to obtain the testimony of the three other Marines was a legitimate reason for the delay, and petitioner did not suffer undue prejudice as a result of the delay. Pet. App. 7a-10a.

ARGUMENT

Petitioner argues (Pet. 8-14) that the Court of Military Appeals erred in applying the *Barker* balancing test. This factbound contention is plainly without merit and it warrants no further review.[2]

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[2]We note as well that subsequent to petitioner's court-martial, a rule modeled after the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, became effective in military proceedings. See *Manual for Courts-Martial, United States, 1984*, Rule 707, 49 Fed. Reg. 17152, 17189-17190 (1984). Like the Act, this rule has "mooted much litigation about the requirements of the Speedy Trial Clause." *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 1 n.1.

The delay in this case of only eight months—during which petitioner was neither incarcerated nor required to post bail—is scarcely of such magnitude even to require detailed inquiry into whether it might rise to the level of a constitutional violation.[3] See *United States* v. *Lewis*, 759 F.2d 1316, 1350 n.16 (8th Cir. 1985), cert. denied, No. 85-69 (Nov. 18, 1985) (seven-month delay not sufficiently prejudicial to trigger further analysis of *Barker* factors); *United States* v. *Otero-Hernandez*, 743 F.2d 857, 858 n.3 (11th Cir. 1984) (same). Moreover, the government's attempt to secure the testimony of other witnesses who had made sworn statements implicating petitioner in more serious offenses was a wholly legitimate reason that justified the slight delay that did take place. See, *e.g.*, *Barker* v. *Wingo*, 407 U.S. at 531; *United States* v. *Fairchild*, 526 F.2d 185, 187 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976); *United States* v. *Baumgarten*, 517 F.2d 1020, 1025 (8th Cir.), cert. denied, 423 U.S. 878 (1975). Contrary to petitioner's apparent contention (Pet. 8, 12-13), there was absolutely no showing in this case of "bad faith or dilatory purpose on the Government's part." *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 13. As the court below concluded, "[o]nce the witnesses recanted their statements incriminating [petitioner] * * *, the unsubstantiated charges were promptly withdrawn, and the remaining charges were referred to a special court-martial." Pet. App. 9a; see also Tr. 14-20, 21-23; Tr. App. Exhs. 1, 9.

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[3]Petitioner's contention (Pet. 10 n.1) that the period of delay should be measured from the time that state charges had been instituted is without merit because petitioner was neither arrested nor charged by military or other federal authorities at that time. See *United States* v. *MacDonald*, 456 U.S. 1, 10 n.11 (1982) ("Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign."). Even if he were correct, however, the additional 3 and one-half months of delay would hardly be sufficient to change the result.

The Court of Military Appeals properly concluded that petitioner did not suffer significant prejudice from the delay in light of the absence of pretrial restraints and any impairment to the defense. Pet. App. 9a-10a. Indeed, petitioner benefited in several important respects from the delay: the most serious charges against him were dropped after the other Marines recanted their statements; the case was referred to a special court-martial rather than a general court-martial, thereby exposing petitioner to a significantly less severe maximum punishment (see *Middendorf* v. *Henry*, 425 U.S. 25, 31 (1976)); and "[i]f anything, it was the prosecution's case that deteriorated" (Pet. App. 10a) during the delay. Petitioner is obviously incorrect in arguing (Pet. 8, 10-12) that the court below imposed too heavy a burden of demonstrating prejudice. To the contrary, the Court of Military Appeals found that the delay in this case was " 'presumptively prejudicial' " (Pet. App. 7a, quoting *Barker*, 407 U.S. at 530), and it carefully analyzed petitioner's contentions with respect to actual prejudice. Pet. App. 5a, 9a-10a.[4] The court simply concluded that, on balance, the "minimal" (*id.* at 10a) prejudice to petitioner was insufficient, in light of the relatively short and adequately justified delay, to give rise to a violation of the Sixth Amendment.

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[4]The delay in this case did not cause petitioner irrevocably to lose various educational and employment opportunities, as he asserts (Pet. 11). Rather, the delay forced only a postponement of his plans. See Tr. 43. Moreover, petitioner could have continued his college education at Eastern Carolina University while he was awaiting trial, and he had in fact rejected the job offers in question primarily because he wished to pursue his education. See Tr. 42-44, 377. Indeed, petitioner had not even ruled out continuing his military career (see Tr. 378), an option foreclosed not by the delay in this case but by his conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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